UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

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| TORREY, ET AL, | DOCKET 5:17-CV-190 |
| VS. | APRIL 23, 2021 |
| INFECTIOUS DISEASES SOCIETY OF AMERICA | 10:10 A.M.<br>TEXARKANA, TEXAS |

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REPORTER'S TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROBERT W. SCHROEDER, III
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS RECORDED USING MECHANICAL STENOGRAPHY;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

(OPEN COURT, ALL PARTIES PRESENT.)

(REPORTER'S NOTE: During the following proceedings there were disruptions in the audio as a result of it being held via videoconference. These are noted in the transcript.)

THE COURT: We'll go on the record now. Lisa Torrey, et al., versus the Infectious Diseases Society of America, Civil Action Number 5:17-cv-190.

Would counsel please state their announcements for the record.

MR. EGDORF: Good morning, Your Honor. This is Gene Egdorf, lead counsel for the Plaintiffs with my cocounsel Daniel Dutko, Ryan Higgins and Lance Lee.

THE COURT: Good morning, Mr. Egdorf.

MR. EGDORF: Good morning, Your Honor. Good to see you again. I hope you're well.

THE COURT: Nice to see you.

MR. DUNN: Your Honor, Alvin Dunn of Pillsbury Winthrop representing IDSA and the six doctor Defendants. With me as a presenter on the video conference is Michael Worley, an associate in our office, and I hope that was clear enough.

THE COURT: Yeah, that's fine, Mr. Dunn. Good morning to you.

MR. HOLT: Good morning, Your Honor. Benjamin Holt on behalf of United Health.

THE COURT: Good morning.

MR. ROESER: Good morning, Your Honor. Randy Roeser this afternoon on behalf of Aetna.

THE COURT: Good morning, Mr. Roeser.

MS. SHOEMAKER: Good morning, Your Honor. Katherine Shoemaker on behalf of Anthem.

THE COURT: Good morning, Ms. Shoemaker.

Okay. I believe that's it.

We have set for hearing this morning a number of motions. There's a motion for summary judgment, two motions for -- two motion to dismiss, a motion to stay and a motion for sanctions.

The Court had previously set time limits for the -- for the various motions and shared that information with the -- with the parties. The parties have met and conferred and let us know that the preferred order for proceeding this morning is first the argument on the motion for summary judgment, then motions to dismiss, followed by the motion to stay and then the motion for sanctions. I think that puts us at a -- a potential hearing length of about three hours. We'll see where we are and whether it's necessary to take a break for lunch.

So with those preliminary comments, Mr. Dunn, if

you wish to go forward at this time on the motion for summary judgment, you may do so.

MR. DUNN: Thank you, Your Honor. And if I go too fast or get to a point where you're not able to hear me, please interrupt if you ever have a question.

Your Honor, we do have four motions. They're linked and in part they're overlapping. Four points are as follows.

Your Honor, the Defendants, the IDSA doctors are here today seeking the Court's help because Plaintiffs, after conducting full discovery, now have no evidence to support their claims.

Your Honor, they have no evidence of payments from the Insurance Defendants to the doctors who wrote the guidelines. Your Honor, the Plaintiffs know they have no evidence to support their claims and they knew it at least more than three months ago. And the case should have been over at that point.

Your Honor, Plaintiffs should have dismissed their claims at the beginning of January when discovery ended, but Plaintiffs did the opposite. They refiled their RICO and antitrust claims in the Second Amended Complaint without alleging a single new fact. But in that Second Amended Complaint, they yet again alleged they needed meaningful discovery to find evidence of the alleged

payments that are the foundation of their RICO and antitrust claims.

But, Your Honor, at that point, discovery was over. Plaintiffs have had three years of full and unlimited discovery regarding the core allegations supporting their claims.

Now, in that same pleading, Second Amended Complaint, Plaintiffs brought brand-new misrepresentation claims without alleging a single new fact. Zero new facts. And those new misrepresentation claims, Your Honor, if permitted to stand undisputed would require extensive additional discovery regarding new and different liability allegations, brand-new damages allegations.

But, Your Honor, discovery was over and Plaintiffs, knowing that their original claims had no evidence, they want to start over with a brand-new case. And, Your Honor, this misconduct is just a continuation of Plaintiff's misconduct throughout the case.

Your Honor, they have ignored court orders and court rules, delayed discovery and delayed the IMEs. We tolerated most of the misconduct but at this point we had to call Plaintiffs on their undisputed Rule 11 violation, their filing of a new complaint after discovery without evidentiary support for their factual allegations.

Your Honor, even after that, their misconduct got

worse. They filed another amended complaint and doubled down on false claims, same allegations of payments with no evidentiary support.

And then, Your Honor, they set forth all the justifications for their late filing. They said they filed their new claims only because they learned new facts during the recent depositions. Your Honor, that was false. All the facts they needed to relate to the new claims at the beginning of the case prove they brought their new claim without putting a single new fact in their Second Amended Complaint.

Your Honor, the response to our summary judgment motion, Plaintiffs admitted finally they had no evidence of payments from the Insurance Defendants to the doctors and they promised to dismiss their claims against the doctors, all of them, and to dismiss their RICO claims against IDSA.

But, Your Honor, in the very next breath in the opposition paper, this claim they have evidence of payment from, quote, insurance companies to the doctors to support their antitrust claims.

Your Honor, the Court should not be deceived by this slight of hand. This case concerns payment from health insurance companies to the doctors. Not from disability insurance companies, not medical malpractice insurance companies. No Plaintiffs claimed they were

denied disability payments. Plaintiff sued no disability insurance carriers and they sued no medical malpractice insurance companies and their case is about payments from health insurance companies.

Finally, Your Honor, the worst. To justify their false claims, they allege IDSA and the doctors destroyed documents. That was completely false.

Your Honor, Plaintiffs made a complete mess of the case. We're here today asking for the Court's assistance to put an end to the case, please. Put an end to the misconduct, please. And please protect the Court and the integrity of the judicial process by doing what Rule 11 says should be done and impose appropriate sanctions.

Your Honor, regarding our summary judgment motion, way too long but yesterday after repeated requests from the Defendants, Plaintiffs agreed to dismiss their RICO claims and their antitrust claims against the doctors with prejudice and agreed to dismiss their RICO claim against IDSA with prejudice and we join them in a stipulation seeking that dismissal.

THE COURT: So, Mr. Dunn, I have that joint stipulation of dismissal before me, as well as an order and we will get that entered and docketed today. So for purposes of arguing today, as far as I'm concerned at least, you can at least assume that will be entered today

and focus your attention on the IDSA.

MR. DUNN: Thank you, Your Honor. And that was my intention. We appreciate that.

It is relevant, though, to our argument regarding the remaining antitrust claims. The fact that the reason Plaintiffs agreed to dismiss their RICO claims is that they have no evidence of payments from the Insurance Defendants to the doctors. They say that and of course that's the case.

That admission alone should do Plaintiff's antitrust claims against IDSA but Plaintiffs persist alleging that there's evidence of payments to support their antitrust claims.

But, Your Honor, that is false. Look at their complaints, all of them. They alleged payments that support -- allegedly support the RICO claims are the exact same alleged payments that allegedly support the antitrust claims. No payments, no RICO claims; no payments, no antitrust claims.

But, Your Honor, even if that admission is not enough and we move to looking at the evidence Plaintiffs are obligated to set forth to go to trial on their antitrust claims, Plaintiffs fall far short. As Your Honor well knows to survive summary judgment on their antitrust claims at this stage, Plaintiffs need evidence. To survive

summary judgment on their antitrust claims, Plaintiffs need to actually dispute the Defendants undisputed material facts with evidence.

And in particular under Fifth Circuit law to survive summary judgment, when the Defendants submit declaration in which they deny that there was a conspiracy or agreement in sponsoring antitrust claim, the Fifth Circuit makes clear that the Plaintiff bear an even heavier burden to produce substantial probative admissible evidence to support their antitrust claims.

Your Honor, we submit Plaintiffs don't even try. The Local Rules are clear. They say the Plaintiff needs to respond, provide a written response to our statement of undisputed material facts. Plaintiffs did not submit such a response. Under the Local Rules the Court will assume the facts as claimed and supported by the admissible evidence by the moving party are admitted to exist without controversy. The Court will assume those facts are admitted without controversy and beyond that the Court will not scour the record in attempt to unearth an undesignated issue of material fact.

Your Honor, there's no admissible evidence at all.

Your Honor, that brings us to six independent reasons that the antitrust claims should be dismissed on summary judgment and I will briefly address them and, if

necessary, would like to save time for rebuttal if Plaintiffs have any evidence at this point to support them.

Your Honor, there's no evidence of an agreement between IDSA and the Insurance Defendants. Only the payments from the Insurance Defendants to the doctors are relevant to the alleged agreement and there's no evidence of any such payments. Plaintiffs admit that.

Your Honor, because they don't have the evidence they're left to argue that doctors and IDSA destroyed the evidence. But that is not true. No doctor destroyed relevant evidence. IDSA did not destroy relevant evidence. Not at all.

There is no evidence of payment, there's no -- nothing from which you could even infer an agreement. Never suggested that evidence of direct agreement. They have always said you don't see such evidence we have to find circumstantial evidence from which you can draw an inference. Here there is no circumstantial evidence. There's nothing from which to draw an inference.

Your Honor, the second reason, independent reason, summary judgment on the antitrust claims is appropriate, the statute of limitations. Your Honor, you held earlier that statute of limitations is a defendant-by-defendant, plaintiff-by-plaintiff inquiry that is more appropriately addressed on summary judgment than on this complaint on the

motion to dismiss.

Here we are, Your Honor. There's no evidence submitted by the Plaintiff that IDSA, the last the Defendant in this case, committed an act during the limitation period and that's November 10, 2013, to four years forward, November 2017, no evidence that IDSA committed an act during that period and harmed any Plaintiffs' business or property.

Your Honor, in response to our summary judgment motion on this point, all the Plaintiffs do is submit evidence that IDSA has been engaged in lobbying activities during that time period. Lobbied Congress, might have lobbied a state legislature on matters related to Lyme disease.

Your Honor, the Supreme Court held 60 years ago and it's well-settled law that petitioning the government cannot support an antitrust claim. That's what the Noerr-Pennington doctrine says and well-settled law all across the country and, of course, within the Fifth Circuit.

Your Honor, the third independent reason the Plaintiffs have no evidence to support their antitrust claims is that they submitted no evidence of a relevant antitrust market.

First they argued that the relevant antitrust

market is the Lyme disease treatment market, but, Your Honor, there's no evidence and there can't be any evidence that IDSA competes in that market. IDSA is a professional medical society. It does not provide Lyme disease treatment. It doesn't compete in that market.

Your Honor, the second market they allege is what they call a market for Lyme disease guidelines. Your Honor, IDSA does provide Lyme disease guidelines but that cannot be an antitrust market. An antitrust market is a market in which companies or persons compete with each other to provide products or services at a profit. (Audio disruption) -- gives away the guidelines for free. That is not antitrust market.

Your Honor, it's important to remember, only IDSA remains in the case. There's no allegation that IDSA has paid anything. There's no allegation or evidence that IDSA profited in any way from producing these guidelines.

Your Honor, the fourth reason the antitrust claims on summary judgment should be dismissed -- (audio disruption) -- on those claims on competition by IDSA. Plaintiffs present no evidence that IDSA restricted competition in any way, and just because they say so is not evidence that is sufficient at the summary judgment stage.

Your Honor, the fifth reason is there's no evidence submitted by Plaintiffs that IDSA holds a

monopoly, power or market power in the defined market. They must produce evidence on summary judgment that IDSA has market power to support their Section 1 claims which require an agreement or to support their Section 2 claims that IDSA has monopoly power. There is no evidence of either submitted.

Finally, Your Honor, the sixth reason. Plaintiffs no evidence that they have been injured in their business or property. Your Honor, Plaintiffs' damages with derivative of their personal injury and therefore are not recoverable under the Sherman Act which permits recovery to business or property.

Your Honor, The Court did look at this issue in connection with the first motion to dismiss filed by the Insurance Defendants and that was joined by IDSA and the doctors -- it wasn't prepared by us -- and Your Honor ruled at that stage that Plaintiffs had properly pled injury to business or property. That was then and this is now and we ask the Court to consider the ruling of the appellate court that has looked into this issue in the greatest depth, the Sixth Circuit opinion in the Jackson case, which we acknowledge was not included in the Insurance Defendants original motion to dismiss at the beginning of the case. We ask the Court to consider that which is the case that goes into the issue clearly in the most depth.

And at summary judgment, now Plaintiffs need evidence of their injuries to business or property which they do not submit and the Plaintiffs just recently amended their complaint, Your Honor, to allege personal injuries showing you what they're really seeking in this case.

Your Honor, there's multiple independent reasons to grant summary judgment on the antitrust claims and at this stage, Plaintiffs cannot rely on allegations or suggestions. They must set forth the evidence and they have no evidence. Your Honor, I would like to reserve my remaining time on this issue for rebuttal.

THE COURT: Thank you, Mr. Dunn.

MR. DUTKO: May I respond, Your Honor?

THE COURT: Yes.

MR. DUTKO: Your Honor, Daniel Dutko on behalf of the Plaintiffs. Before I get into the argument, I want to address some of the accusations made by Mr. Dunn. I'm not sure why he used this forum to make those accusations but we disagree with them. The fact we ignored court orders, I'm not quite sure where that comes from. I believe we've tried everything we could to comply with the court orders and to do everything with respect to what the Court wanted in this case.

I'm not sure why Mr. Dunn referred to our filings, our petitions, our complaints as late filings because these

were not filed late. These were filed months before the pleadings deadline that Mr. Dunn proposed and agreed to.

I'm not sure why Mr. Dunn said that our Second Amended Complaint alleged no new facts. When you look at paragraphs 193 and 198, you can see new facts in the Second Amended Complaint that specifically are not laid out in the other complaint, and I'll give the Court an opportunity to turn to that. I'm looking at paragraph 193, Your Honor.

You can specifically see there are new facts set forth with respect to our fraudulent misrepresentation claims, and they're all bullet-pointed there. And there also new facts with respect to the negligent misrepresentation claim in 198 that are bullet-pointed.

So I'm not quite sure why Mr. Dunn has made these representations to the Court, especially in light of the fact that it has been difficult at best to get documents and information from Mr. Dunn regarding his clients. I know this is not a discovery dispute and our discovery issues are set forth in our motion and we'll rest on those papers with respect to that issue.

But I do want to point out that Mr. Dunn seems to have taken the position that his interpretation of the Court's order and his interpretation of the letter of the law is what governs the discovery in this case and has either withheld documents, not produced documents or

destroyed documents. And so that is all set forth in our motion but I would like to now address the allegations of our antitrust claim.

The first issue that needs to be raised, Your Honor, is that Plaintiffs in all of their complaints have alleged Section 2 violations of the antitrust claim. Mr. Dunn's motion for summary judgment, the IDSA's motion for summary judgment, does not even address Section 2. There is no issue with respect to Section 2.

And I'm going to make sure I'm careful with that because on page 25 of the IDSA's motion, they begin with listing a couple of the elements of Section 2, but then the very next sentence goes back specifically into Section 1 and that is the last reference to Section 2 anywhere in the summary judgment papers.

I searched through the reply to see if maybe they tried to address the Section 2 arguments and there is no reference -- there's three references to Section 2 but nothing with respect to proving or disproving Section 2 antitrust claims. Therefore, it's Plaintiff's position that even if the Court were inclined to grant the Section 1 summary judgment, the Section 2 has not even been addressed and cannot be granted at this time.

Turning now to Section 1 of to Sherman antitrust claim, the Court has lived with this case for a long time

and knows the facts but just briefly if the Court will indulge me, as the Court is aware, Lyme disease as it exists today is a very big issue. In fact, Congress has enacted the working group, Stanford recently enacted their own working group -- Stanford University. Lyme disease and chronic Lyme disease is so prevalent and such a big deal that legislatures around the country are passing laws for the treatment and diagnosis of Lyme disease.

And this all began, Your Honor, in the mid-'90s. And the reason that is important is because before the mid-'90s, there was no issue of Lyme disease and there was no epidemic around the country and that is because insurance companies paid for the long-term treatment of Lyme disease.

Around the mid-'90s, insurance companies decided they didn't want to pay for long-term treatment of Lyme disease because it was too expensive and they wanted to save on their bottom line. That is set forth in the evidence before this Court in the deposition of Dr. Sanchez, who was a vice president of Empire Blue Cross Blue Shield. Dr. Sanchez testified that because they didn't want to pay for Lyme disease, they enacted arbitrary guidelines and claimed that short-term treatment was all that was necessary for the treatment of Lyme disease.

This is the very first time that a claim could be

made by the insurance companies that treatment failure did not exist. Coincidentally -- not coincidentally. At the exact same time, insurance companies began to pay large sums of money to IDSA panelists and specialists working on guidelines. Now Mr. Dunn claims there's no evidence of payment, but we have set forth in our response detailed explanation of payment, even though we could not get any documents from the Defendants about these payments.

Dr. Sigal was hired by the IDSA to review the guidelines. He reviewed them for the IDSA. He testified he was hired by insurance companies to review hundreds or thousands of Lyme disease files, earned hundreds of thousands of dollars. When I questioned Dr. Sigal, do you think you made more than a million dollars from insurance companies at this time, he paused, thought about it, and said doubtful. Not no, not I didn't make a million dollars from insurance companies. That's doubtful. All the money he received was the exact same time these guidelines were coming out.

Dr. Shapiro testified he provided expert testimony in 75 to 80 cases, admitting to being a witness in malpractice cases involving Lyme. And when Dr. Shapiro was to be put on the Congress' tick-borne working group, more than 40,000 people protested that because of his payments to insurance companies.

Dr. Dattwyler testified he was hired numerous times by insurance companies, hired as a consulting expert in Lyme cases, charged 500 to $600 an hour in Lyme disease cases. That is the evidence we have had to create without discovery because we haven't received any documents related to these payments from the Defendants but that's not all, Your Honor.

The Attorney General of the State of Connecticut in November of 2006 conducted its own investigation. It determined -- sent CIDs to the IDSA panelists, to the insurance companies and it reviewed all of these documents and it concluded, quote, several of the most powerful IDSA panelists have undisclosed financial interest in insurance companies, including consulting arrangements with insurance companies.

So these documents, which we still have not been able to see, that were not produced by the Defendant, were not produced by the Attorney General because all of them were returned to the Defendants, these documents were read with the eyes of the Attorney General's office and they determined there were antitrust violations and they talked about the payments to the IDSA panelists.

So it is -- we are allowed to prove our case with circumstantial evidence. There are very rarely cases in which we can find a document that sets forth that the two

parties came to an agreement. There are very rarely cases involving a conspiracy in which we can prove it with a smoking gun.

So what we do is we present it with circumstantial evidence. It is absolutely no coincidence that at the exact same time that the IDSA is putting out guidelines, the IDSA panelists are receiving payments and the -- the insurance companies are paying these IDSA doctors at the exact same time. It's no coincidence, Your Honor.

THE COURT: Let me ask you, Mr. Dutko. I'm well familiar with the history of the case and the Plaintiff's allegations, so I don't know that there's a lot of need to go over this in great detail, but given your preliminary comments, if the insurance companies started denying these long-term treatment claims as you said in as early as the mid 1990s, but the guidelines themselves weren't actually written until 2000 and 2006, how did this alleged conspiracy change any -- any of the insurance company's behavior?

MR. DUTKO: It changed the behavior in a couple of ways but most importantly, as the Court is aware, when -- if you were to have treatment and you get denied by your insurance company, you can then appeal it. And when you appeal it, you have the opportunity to present your argument and your doctors will say, this patient needs

long-term treatment.

That became impossible after the guidelines were created because then the insurance companies could deny the appeal with the argument that all of the experts in the IDSA have now said this is the only treatment you need and there's absolutely no treatment failure.

So when you have another disease, when you have any other disease, you have a very good opportunity to get alternate treatments. But with Lyme disease, because they conspired with these IDSA doctors, they created, in essence, a monopoly on the treatment of guidelines -- of Lyme disease and so now the insurance companies could not only deny it, but they could use it to deny any sort of appeals and any sort of issues in paying for it.

THE COURT: So are you saying there were no appeals denied before 2000?

MR. DUTKO: I'm saying that before 2000 it was much easier to receive long-term treatment on Lyme disease and, in fact, Dr. Sanchez's testimony, you will see, which is attached as an exhibit to our response, Dr. Sanchez talks about the appeals process in-depth and talks about how you can appeal it, but -- and you can get treatment, but basically after 2000, in 2006 when the guidelines were created, the appeals process became almost impossible.

And we know that, Your Honor, because of the

testimony of the Plaintiffs in which Plaintiffs cannot get treatment through insurance so they have to pay out of pocket.

So yes, Your Honor, before 2000 when the guidelines were created the appeals process and the ability to receive coverage was out there but after 2000 it became almost impossible to overcome that heavy burden.

So what we have, Your Honor, is we have circumstantial evidence establishing that the insurance companies conspired with the IDSA doctors to create guidelines that restricted trade.

So we move on to one of the other arguments made by the Defendants, and that is whether or not -- let me make sure you I wrote that down -- whether or not the IDSA restrained trade. And briefly, Your Honor, before I move on to that, if I'm allowed to share my screen, I would like to show the Court a document if the Court doesn't mind.

THE COURT: Not at all. Go ahead.

MR. DUTKO: Your Honor, can the Court see this document?

THE COURT: Yes.

MR. DUTKO: Your Honor, this is a document created by the IDSA and sent to state policy -- sent to state legislators when state legislators were trying to pass laws to help Lyme disease treatment. The IDSA went out of its

way to protect the insurance companies and if you look down here on the second page of this document, Your Honor, the IDSA specifically addresses the issue of requiring health insurers to cover Lyme disease treatment that are not supported by scientific evidence including long-term antibiotic use and experimental drugs.

So the issue before this Court is why -- if the IDSA does not have an agreement with the insurance companies to create guidelines that are untrue, then why do they go out of their way to push this idea on state legislatures. If they're so independent, as counsel for IDSA points out, why are they sending letters to state legislatures saying insurance companies should not have to pay. What does it matter to them? What does it even matter?

And I want to point out, Your Honor, that counsel raised the Noerr-Pennington doctrine with respect to these documents that we produced. And first of all, Noerr-Pennington doctrine is an affirmative defense that has to first be proved by the Defendants. All they did was mention it and talk about how it restricted it. They presented no evidence to create a presumption that we have to overcome that -- they didn't meet that burden.

But more importantly, Your Honor, in the AlliedTube case, AlliedTube looked at the Noerr-Pennington

doctrine with respect to standard-setting organizations like this case and said: When, however -- and I'm quoting AlliedTube, United States Supreme Court.

(As read): When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interest in stifling product competition, these private standards have signature procompetitive advantages. Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade.

AlliedTube and then later the Fifth Circuit in RRR Farms versus American Horse Protections in which the Fifth Circuit said, therefore, as the summary judgment movement -- this is -- sorry. This case is Amphastar Pharmaceuticals in the Fifth Circuit.

(As read): Indeed, the Supreme Court has held the petitioning of a private SSO like the USP generally does not trigger Noerr-Pennington protection.

And so all of the documents we have established with respect to their lobbying efforts, those are all admissible and do not fall under Noerr-Pennington. If they did, they didn't meet their burden of their affirmative defense, so we would rely on those documents.

The next issue is whether they control -- restrain trade and control the Lyme disease market. And I will briefly -- there's a lot of evidence of this, Your Honor, but I just want to read the HHS 2020 subcommittee report on the Tick-Borne Working Group and I'm going to read from this.

(As read): The IDSA is the largest infectious disease specialty society in the world, publishes the two largest medical journals in the field, dominates peer review and often functions as a gatekeeper for hospital staff privileges. Its restrictive Lyme disease guidelines, which make it difficult for patients to achieve diagnosis and receive care, have been adopted by many insurers and often referred to as an authoritative source by many physicians who do not specialize in the decease. In addition, members of the IDSA provide expert testimony to enforce its views to enforce disciplinary actions against practitioners who do not comply with the guidelines.

The Tick-Borne Working Group went on to hold ultimately in their final report to Congress: Although the IDSA is aware that there are two standards of diagnosis for care for patients with Lyme disease, their treatment guidelines do not disclose this fact and many patients and clinicians may not be aware that another diagnosis or treatment approach exists.

There is tremendous amount of evidence that they restrain trade in the market. There's a tremendous amount of evidence that they dominate the market and that they're the only organization that is looked to by doctors all over the country. In fact --

THE COURT: What exactly is the market? What's the market?

MR. DUTKO: That's -- and that's a good question, Your Honor, because that was one of the issues. And to answer that question -- just give me one second, Your Honor. I'm going to find it.

To answer that question let's just rely on what the IDSA says. The market is the United States in the Lyme treatment market, Your Honor. That's the answer to the question. That's not me saying that. That's the IDSA saying that.

This is in the IDSA guidelines, Your Honor: The objective of these practice guidelines are to provide clinicians and other health care practitioners with recommendations for treatment of patients in the United States with suspected or established Lyme disease.

That's the IDSA. They have defined their own market. The market is Lyme disease treatment and treatment and diagnosis in the United States. And that has been upheld by other courts. The treatment in the United States

has been upheld by numerous courts and we cite to those, Your Honor, in our response on page 18 and page 19.

THE COURT: Aren't those cases -- and correct me if I'm wrong, I thought those cases primarily, at least, relate to practitioners in the field and that's not at issue here, is it?

MR. DUTKO: Well, Your Honor, they -- they relate to treatment and care of patients within a certain field. For example in the Weiss case, they upheld a nationwide inpatient hospital health care market as a relevant market in an antitrust cast. In the labor case, they upheld hospital based osteopathic anesthesiology as a relevant market, nationwide, in an antitrust case.

So it is true, Your Honor, that -- I mean, I'll say to the Court that Lyme disease obviously is a -- this is a unique set of circumstances. You're not allowed a case involving antitrust with standard setting organizations with respect to treatment guidelines. But if you look to these cases, it's clear that a relevant market can be the diagnosis and treatment of Lyme disease in the United States.

Another case, Your Honor, the Wilke case out of the Seventh Circuit holding and I quote: The relevant market was the provision of health care services to the American public on a nationwide basis, particularly for the

treatment of musculoskeletal problems.

So it's clear, Your Honor, when you look to the other cases that have addressed this issue that the relevant market, Your Honor, is the treatment and diagnosis of Lyme disease in the United States.

This is further established, Your Honor, by the testimony of the IDSA corporate representative when asked: If you were a small town doctor in the city of Texarkana and you're going to treat Lyme disease, you would likely rely on the guidelines of the leading medical authority of the diagnosis and treatment of Lyme disease?

Correct. That would be my understanding. When the IDSA puts these guidelines out, they anticipate that doctors all around the country are going to rely on the guidelines in the treatment and diagnosis of Lyme disease. That is correct.

The IDSA, through it's IDSA guidelines and through its corporate representative have set forth the market and the market is clearly the treatment and diagnosis of Lyme disease in the United States.

So, Your Honor, I'll try to give some time back to the Court, but --

THE COURT: Mr. Dutko, I have a couple of other questions.

MR. DUTKO: Yes.

THE COURT: So there's this allegation out there that documents were either destroyed or not produced. What evidence do you have that documents were destroyed?

MR. DUTKO: Your Honor, I just want to point out that when we use the term "destruction of documents," we're not using that in the term of they knew about this lawsuit and they then destroyed the documents. But we're using it in the term of these documents existed and we know they existed and they don't exist anymore or they haven't been produced. And the evidence we have of that is clearly set forth in our response, Your Honor. And you can see in Plaintiff's response, we go through in detail how people testified that there were documents that were destroyed. And I will find that testimony here.

We went through each one of the -- Dr. Sigal testified that the documents he had regarding his -- his payments from insurance companies no longer exist. Dr. Sigal testified when asked about documents related to work he did for insurance companies, quote, those have been shredded.

THE COURT: So to be clear, there's no allegation that any evidence was spoliated?

MR. DUTKO: Your Honor, we have not made a spoliation argument and when we use the term "destruction of documents," I don't think we're trying to argue that

somebody intentionally destroyed documents, but when we questioned the IDSA representative, when we questioned doctors, when we questioned anyone in this case about where those documents are, they testified I had those documents but when I moved, I got rid of them, I shredded all those documents.

And one of the key documents that we're looking for and have been looking for as the Court is aware is the documents from the Attorney General's office. So all those documents were sent back to the Defendants, none of them have been produced to us. So they're either destroyed or they're in the possession of the Defendants and not produced. And so we know those documents all existed but we don't have them, Your Honor.

THE COURT: And I think the Defendant points out in its papers that no motion to compel on this issue was filed. Is that correct?

MR. DUTKO: Well, I'll -- I'll tell the Court that the reason why motion to compel hasn't been filed is because this issue was not brought to our attention until emails from Mr. Dunn were recently sent and the reply in which there's some indication that some of these documents might exist. I'll give the Court an example.

When we sought payments from insurance companies to the IDSA doctors, we were under the impression as I'm

assuming the Court was, that Mr. Dunn would either identify or produce documents from any insurance company to the doctors.

Now, in their reply, they have taken the position, there may be payments documents out there, but those were not the letter of the law with respect to the Court's order, with respect to the joint agreement, so we didn't have to produce them.

With respect to the documents related to the Attorney General's investigation, the Court has said in its own order that the scope of discovery should include those documents. Now we believe -- recently we're under the impression that maybe Mr. Dunn has those documents but he is reading the Court's order and reading the joint discovery to somehow weave his way through and say he doesn't have to produce those.

THE COURT: So this is the first time that you've become aware that that position has been taken?

MR. DUTKO: It's the first time we've -- we've become aware that he may have documents. We were always under the impression that if he had them, he would produce them. We went through everything, nothing was produced, so we have to operate under the assumption that those documents don't exist. We can't file a motion to compel if we don't believe the documents exist. It's not until

Mr. Dunn in his reply, recently filed, and in his emails, sort of inferred that these documents may be out there.

We have been operating under the Court's rules, which is wide-open discovery and the production of documents. If they don't produce them, we can't just assume they're out there and file a motion to compel. We have no problem filing a motion to compel, we have done it in the past as the Court is aware. If we thought the documents existed, we would certainly file a motion to compel but Mr. Dunn has been less than candid with respect to documents in his possession and we still have no idea what his position is. On the one hand --

THE COURT: Mr. Dutko, I think you're well familiar with the Court's practice, Mr. Dutko. You call Mr. Dunn up on the phone and you have a conversation with him or you send him an email or a letter and if you don't get a satisfactory response, you file a motion to compel. So this is the first I'm hearing about this.

MR. DUTKO: Yes, Your Honor, that is true. But I will point out this is all very recent with respect to Mr. Dunn's position. And we did send emails, Your Honor, we sent numerous emails. At one point I said -- when he pointed out we didn't destroy documents, I said, Mr. Dunn, you either have them or they have been destroyed, tell us which it is, and we didn't get an answer.

So I'll admit our focus has been on all of these motions and responding to all of these motions. As you can see there's numerous motions, so if I didn't act as quickly as I should, I apologize to the Court.

THE COURT: I guess, Mr. Dutko, my concern is this case has been pending for more than three years and the Court has given you every opportunity to conduct whatever efforts at discovery, within reason, you believed were appropriate. And so it seems strange to me that we are here after multiple amended complaints and now a motion for summary judgment and now I'm hearing for the first time that you don't think Mr. Dunn has complied with his discovery obligations and yet you have never bothered, recently at least, to bring that to our attention.

MR. DUTKO: Respectfully, Your Honor, we have conducted thorough discovery. We have subpoenaed third parties. We subpoenaed the Attorney General. We have not been sitting around not conducting discovery. We sent discovery, we deposed all the doctors, we deposed the IDSA corporate representative. We asked about these documents. We asked whether they had them. We have gone through, in detail, to try to find these documents. These documents are key to our case.

It was not until very, very recently in which Mr. Dunn exchanged emails with us that we had any

understanding that maybe these documents existed. And Your Honor, that is at the end of the discovery period.

And so I find it difficult to -- I mean, we do have some responsibility to act diligently, I understand that, but Mr. Dunn has an obligation to make sure that he conducts discovery in the way this Court intended, which is to say the documents exist and I'm not producing them, not produce them, but we have to operate under the assumption that what we has produced is what he has.

And his interpretation of the discovery order now seems to be the issue in this case, not whether the documents exist or don't exist. So I know that we have an obligation to seek these documents and we have worked hard to try to do so.

MR. LEE: Your Honor, Lance Lee. I -- may I interject at this point on this issue because it does relate to what my argument is going to be on the Rule 11 issue.

I was floored when I read Mr. Dunn's reply on the Rule 11 motion and at page 6, they state: IDSA was not obligated to produce documents it provided to the Connecticut Attorney General's investigation unless they fell within the scope of discovery in this case.

That is the first time that any of us on the Plaintiffs' side were ever aware that there may be

documents that are being withheld. There is no question that the entirety of the CID responses are relevant to this case.

Your Honor indicated as such in your order of April 9, 2019, when you said at page 7: Thus, discovery should be broad enough to include the information collected and considered by the Attorney General. The 2008 investigation sought discovery back to 1998. Accordingly, non-email discovery should include materials created in 1998 and any time thereafter.

Every time that we -- my recollection is every time that we made an inquiry during discovery related to the CID responses and the Connecticut Attorney General information, we were told "we have no responsive documents." That's what we were told on more than one occasion.

And for this to now appear in the reply brief for the first time, I hope that that illustrates what your -- answers what your question was. You know, why didn't we file a motion to compel? Maybe we should have tried to file a motion to compel before this hearing, but the issue is and the question is, I guess, do the files still exist and, if so, why were they not produced? Because the CID and the investigation by the Attorney General is at the heart of our antitrust claims. I hope that --

THE COURT: It does. Thank you, Mr. Lee.

Back to you, Mr. Dutko. Mr. Dutko, you're actually out of time but I do have a question, just a general question for you if I may before you close.

And of course, there was the stipulation of dismissal with respect to the individual doctors and the RICO claims and, you know, I certainly am not trying to put words in your mouth or make educated guesses about what the Plaintiffs' view about this, but at least in part reading between the lines in -- in the Plaintiffs' response to the motion for summary judgment, it could lead one, reading it fairly, to conclude that the Plaintiffs are taking the position that they have, rightly or wrongly, have been unable to discover evidence to support the RICO claims.

So my question for you -- assuming that's correct, my question for you is this: If there is no evidence to support the RICO claims, why is there evidence to support the antitrust claims?

MR. DUTKO: Your Honor, I will answer that. So the issue with RICO as the Court is aware is the standard is a little bit different than the antitrust. In order to establish a RICO claim we have to establish exactly the newspaper questions: the who, what, when, where and how. In order to do that, we have to identify wire fraud or mail fraud and what that means is as the Court knows, you have

to identify the date it was mailed, how much was mailed, who it was mailed to, where it was mailed.

Your Honor, that is vastly different than establishing a conspiracy with respect to circumstantial evidence because the RICO predicate is much more stringent. Your Honor, we were operating under the impression that we would receive certain documents with respect to payments, the same documents that the Attorney General received, which would establish the who, what, when, where and how. When we did not get the documents that we anticipated getting, we agreed to not bring suit or dismiss the RICO claim because we cannot establish that very stringent predicate.

So the answer to the question is circumstantial evidence doesn't work in RICO. I can't say that I believe payments were made on these days. I have to establish -- the Court knows the criminal standard and it's very stringent and we felt like we couldn't meet that in good faith in light of the evidence we did not have, so we didn't want to waste the Court's time with that.

We thought we could bring a couple of the doctors in, but without RICO jurisdiction, we didn't want to have that fight, so we agreed to dismiss them all. But as you recall from the jurisdictional arguments, we believe there's jurisdiction over some of them, but we just didn't

want to waste the Court's time with those issues, so we simply dropped them because we couldn't establish that predicate.

THE COURT: That's a helpful response. Thank you, Mr. Dutko.

MR. DUTKO: With that, Your Honor, I will pass my time.

THE COURT: Thank you very much.

Mr. Dunn, you have 13 minutes.

MR. DUNN: Okay. Thank you. And I don't know whether somebody else has volume on, but when Mr. Dutko was speaking I was hearing echoing and I hope this is clear and people can hear me.

Your Honor, to address first what Mr. Lee was saying and the whole assertion that we have held documents that have been -- that we have been obligated to produce. Your Honor, we have held nothing back that we were obligated to produce. We were very clear that we, yes, have the materials submitted to the Connecticut Attorney General, but no, we were not obligated at any point to turn 100 percent of those materials over because, as the discovery order makes clear, Your Honor, we agreed with Plaintiffs that we would search materials that we have, including the Connecticut Attorney General materials for certain information prior to 2010. And there was a very

contentious dispute about how extensive discovery prior to 2010 would be for all parties.

And, Your Honor, we reached an agreement and we specifically addressed what would be searched within the Connecticut Attorney General materials. It specifically says: Payments from the Insurance Defendants to the doctors, communications from the Insurance Defendants with the doctors about the guidelines. It was very specific. It does not address -- it does not obligate IDSA to turn over any information if information exists regarding payments from disability insurance companies, from medical malpractice from insurance companies. Your Honor, that is very clearly laid out in the discovery order, so that's number one. Nothing was withheld that was ordered to be produced. Nothing.

THE COURT: So let me follow up, Mr. Dunn. I may have misunderstand what Mr. Dutko said it, but as I understood it, he said he did not know until very recently that, in fact, the Connecticut Attorney General investigatory documents might actually exist and that he had previously been led to believe that the documents had been returned by the AG's office to whoever submitted them and that they were not kept. So can you enlighten me at all about this?

MR. DUNN: He has no basis to claim such an

understanding, Your Honor. We agreed in 2019 that we would search the materials produced to the Connecticut Attorney General. We agreed exactly on the scope of that search. That's in the filed discovery order, Your Honor, it specifically mentions the Connecticut Attorney General materials.

We would never have put that in there if we did not have them any longer. We would have -- it's Docket 181. Your Honor, we would not have agreed to do that if we didn't have the materials. We would have told them that. So that's number one, Your Honor.

Number two, if they thought they were going to get documents from the Connecticut Attorney General, they would have had those documents by June 1, 2020. That's the document discovery deadline in the most recent docket control order. At that moment, if they thought they were getting documents and if they thought they were entitled to everything, that's the moment, no later than that, they should have raised this issue. We heard nothing about it, Your Honor.

Number three: They took IDSA's corporate deposition in November, 2020, six or so months ago. The corporate representative was very clear. We have the materials from the Connecticut Attorney General's investigation that we provided. We've turned them over to

counsel for counsel to search according to the rules of discovery in this case.

If they thought that we had failed to give them those documents, that was their third opportunity, Your Honor, to come to us and claim that they needed those documents. They never did that, Your Honor, and for them to say now, even at the end we sent an email that we didn't respond to, that's false, Your Honor. We responded timely to every single email, so there is nothing that was failed to be produced according to the rules of this court and they are way late to argue that oh, all of a sudden everything had to be turned over.

Not even close, Your Honor. It's very clear in these orders and this was done for a reason because going back and searching before 2010, all these materials and emails, et cetera, was something that all the Defendants objected to and we reached an agreement. Plaintiffs agreed to it, we brought it to the Court and the Court entered it. Your Honor, that is the answer to that.

And it's not only way too late for them to raise this, it's just completely wrong. There's nothing in the -- and we searched high and low, those documents for payments from the Insurance Defendants, what they agreed was relevant, to the doctors. That's what they wanted us to do and we looked through it and it's not there,

Your Honor. And it's not a surprise it's not there.

So that's -- IDSA actually kept everything so there's no -- nothing was destroyed. And they cannot claim that they get to take their antitrust claims against IDSA only to trial because of -- because of that.

Your Honor, very quickly, I want to try and get through many of the things that Mr. Dutko said. Look, they did ignore court orders. Two examples, they delayed filing an amended complaint as ordered by the Court within 30 days, so months and months and months. Another clear example, the Court order said you're limited to five experts and they designated seven when they started this and there's many other examples, Your Honor.

Your Honor, the Second Amended Complaint does not allege new facts. It only alleges --

THE COURT: Mr. Dunn, you've got six minutes left. I'm happy to hear this but I really would prefer you to focus on the antitrust part of the case.

MR. DUNN: Okay. So, Your Honor, I think they have pretty much admitted that they don't have evidence of an agreement and they focused on their alleged Section 2 monopoly allegations. And with respect to that, they have no evidence of a monopoly. They present zero evidence.

And the only evidence that they have is they claim it's things that IDSA had said. And the only things that

they point out -- first of all, they have no response to our statute of limitations argument, Your Honor. They have not tried to show that IDSA did anything with the new limitations period to harm any Plaintiff within the limitations period. They totally dropped that.

Your Honor, with respect to arguments that IDSA has made to state legislatures that they put in front of you on the screen, arguing that IDSA's statements in a standard document on the website defending the science and telling state legislatures please follow the science, that cannot support the inference of a conspiracy.

There is a legitimate basis for a professional society to say to state legislatures that you should follow the science, even if, in this case, it might lead to limited treatment that they can claim helps health insurance companies. You can't infer an agreement because of that, because there's another basis. They are just trying to follow the science.

Noerr-Pennington says when you're talking to a state legislature or Congress, you cannot use that to support an antitrust claim. And their effort to say, oh, look at these cases, and if you are petitioning a private standard setting organization, that does not give Noerr-Pennington protection. That's not what they're arguing about here. It's petitioning the government is

what they're citing and those cases in no way hold that somehow petitioning the government can give rise to an antitrust violation.

Your Honor, they cite this Tick-Borne Diseases Working Group report to HHS. It's all hearsay and it doesn't show a monopoly in a defined market. Nothing at all. They define the market now as the market for treatment of Lyme disease and as I think Your Honor appreciates, they never argue and they have no evidence to support an argument that IDSA competes in that market. IDSA is not a health provider. There's no evidence that IDSA provides treatment in that market. They need evidence which they have none of, that IDSA restricts competition in that market.

All of their cases, as you pointed out, Your Honor, are ones where they concern providers of the services in the market. No allegation that IDSA actually provides these services.

Let me just check my notes, Your Honor.

And finally, Your Honor, Mr. Dutko is still trying to confuse the Court, if you don't mind. When he talks about evidence of payments, he is not precise and he needs to be. (Audio distortion) -- precise he has no evidence because he talks about Dr. Sigal, who is the only doctor who actually -- actually, there's evidence that he did any

work for an actual health insurance company, but he never had anything to do with the 2000 guidelines, was never an author of either guideline, and actually only reviewed a late draft of the 2000 guidelines and testified he made no substantive changes at all.

And the allegation that he no longer has documents and destroyed them, Your Honor, there's no assertion at all that Dr. Sigal or any other doctor had an obligation to preserve documents from consulting arrangements 10, 15, 20 years ago, and they failed to point out that the reason they were shredded is that he moved a few years ago, well before the case was filed, and had every right to not take all those old documents with him.

All the other evidence that Mr. Dutko cites with respect to alleged payments, Dr. Shapiro, Dr. Dattwyler, zero evidence of payments by health insurance companies. It's all disability insurance companies, medical malpractice insurance companies, irrelevant. Your Honor, summary judgment is appropriate on the antitrust claims remaining against IDSA.

THE COURT: All right. Thank you, Mr. Dunn.

Before we move on to the argument on the motion to dismiss, let's take a short recess of probably about ten minutes.

(Recess taken.)

THE COURT: Okay. We are back. Do we have everybody else back?

MR. DUNN: Your Honor, you have everyone you need for the Defendants. I see at least one screen that doesn't have a person in it on the Plaintiffs' side.

THE COURT: Did we lose Mr. Egdorf?

MR. EGDORF: I'm here, Your Honor. I was trying to be nondistracting and I turned the microphone and the camera off. I promise I'm listening attentively and biting my tongue as you might imagine, Your Honor. If you need me, call me.

THE COURT: No, I don't. Want to make sure you didn't drop off completely.

Okay. Argument on the motion to dismiss.

MR. DUNN: Thank you, Your Honor.

Just before we get started because it was an issue at the very end, just wanted to point out to the Court that on March 16, 2001, in Docket 386, which is our reply in support of our summary judgment motion, we cite and attach the IDSA corporate representative testimony from November of 2020 that IDSA preserved and searched the materials that it submitted to the Connecticut Attorney General. So that's Docket 386, page 9, Exhibit 17, and then we discussed it in a later filing as well in connection with the Rule 11 motion. We just wanted to give that cite to

the Court.

THE COURT: Thank you.

MR. DUNN: Your Honor, we're now arguing Defendant's motions to dismiss the new misrepresentation claims and it's motions because they have set forth, Plaintiffs, these claims in two separate amended complaints filed in 2021.

Your Honor, there are seven, now, independent reasons that the new misrepresentation claims should not go forward. Your Honor, the first, the most clearcut in our view. The Court should strike the amended complaints.

Your Honor, the Fifth Circuit gives this Court the discretion to strike the complaints. And, Your Honor, absolutely, the docket control order says parties can amend their pleadings up to April 16, 2021, without filing a motion to amend.

Now, Mr. Dutko said that we wrote that, I think he said. He might have said they wrote that prior times they've argued we agreed to it. As Your Honor is well aware, that's a standard provision in the Court's docket control order to put that deadline at the very end of discovery.

Your Honor, the right to amend a pleading at the end of discovery cannot give Plaintiffs the right to add new claims that require extensive additional liability,

damages and expert discovery particularly when those new claims, as here, could have been brought at the very beginning of the case.

How do we know that they could have brought these new misrepresentation claims at the beginning of the case? We don't have to go any further than their Second Amended Complaint. The first time they brought the claims they filed them without adding a single new factual allegation.

Mr. Dutko points to some new paragraphs in the Second Amended Complaint. Every new paragraph is a paragraph that comes under Count VI or under Count VII. There are no new factual claims. Each one says this count incorporates all the prior paragraphs before it. Each count when it alleges a misrepresentation, cites back to a prior paragraph in the complaint, a paragraph that was in the complaint long ago, before the Second Amended Complaint was filed.

Your Honor, these are brand-new claims trying to bring a brand-new case after Plaintiffs's determined that their original case had no factual support and would be dismissed on summary judgment. It's a complete abuse of the docket control order provision that says you can amend your pleading at the very end of discovery. That can't be what it allows. This Court has ever right to exercise its discretion under Fifth Circuit precedent to say no, we're

not going to allow that, the case is over, and if you want to bring a new case, to bring it as a new case. This case is over.

Your Honor, the second reason that the new misrepresentation claims should be dismissed. Plaintiffs failed to plead them with particularity under Rule 9(b). Your Honor, we discussed a bit in the last motion what that means and Mr. Dutko actually confused, in our view, his obligation to plead with particularity with his obligation to come forward with evidence in support of his claims at the summary judgment stage because you rightly asked why are there antitrust claims still viable if the RICO claims fail because there's no evidence to support those claims.

Mr. Dutko cited the pleading standard and the pleading standard is you plead fraud with particularity. You plead fraud by showing who, where, what, when, why and how, the newspaper questions. He somehow believes that to show an antitrust claim at summary judgment he doesn't have to come up with specific evidence in support of the alleged agreement and the alleged payments. But he does because if you're going to base an antitrust claim on payments, you have to prove the payments by showing who made them, when they were made, the amount, how they were made.

So now we're at the pleading stage again, Your Honor, and these are misrepresentation claims, both

negligent and fraud claims that according to Fifth Circuit law, well-settled federal law, that need to be pled with particularity. But there's a difference between Plaintiffs' original RICO fraud claims and now their new common law fraud and negligent misrepresentation claims when it comes to pleading with particularity.

The RICO fraud claims, Plaintiffs alleged and you held, Your Honor, that all of the evidence to support those claims was uniquely in possession of the Defendants because the core part of the fraud there, that was alleged, were the payments from the Insurance Defendants to the doctors.

And, Your Honor, you gave them a -- I'm sorry, a relaxed pleading standard and you provided them full discovery. The new misrepresentation claims, fraud claims, critical discussion. Here, Plaintiffs are in possession of the evidence because the new claims allege that the Plaintiffs's doctors were misled by the guidelines. They allege that doctors that they sought and failed to diagnose their Lyme disease somehow relied on the guidelines and missed the diagnosis. They didn't give them their long-term antibiotics.

Your Honor, that's not evidence we have. That's evidence they have. And to bring these new misrepresentation claims under Rule 9(b), they have to tell us in the pleading who relied, when did they rely, what did

they read or hear that was an alleged misrepresentation, how and when did it injure the Plaintiff.

Your Honor, that's not evidence we can ever have and they haven't got it, so they must plead these claims with particularity and they don't allege any of those details or try and this time they cannot argue for a relaxed pleading standard. It's completely different.

And Your Honor, they have now had two tries and they're not entitled to another one and the new claim should be dismissed just on that basis alone.

Third independent reason and this one is very substantial, but it can get complicated, Your Honor. Plaintiffs do not allege detrimental reliance by the Plaintiffs themselves. They allege only detrimental reliance by third-party doctors. That's not enough, Your Honor, and no court has gone this far, to try to hold a professional medical society liable to patients, not for misrepresentations that the Plaintiffs relied on, the patients, for alleged misrepresentations that their third-party doctors relied on.

Your Honor, this Court should not extend the law where no Court has ever gone and this is another pleading deficiency that cannot be cured in yet another complaint.

Your Honor, the fourth reason, independent reason, that these misrepresentation claims should not go forward.

Fifth Circuit law makes clear when you're bringing adversity jurisdiction common law claims, you, the Plaintiff, have the obligation to allege facts in the complaint that will show the governing law, which state's law applies.

That's your burden as a Plaintiff, to help the Court, because when the Court gets a common law claim, the Court needs to know which law applies and it's not necessarily the law of the state where the Court is sitting because the claim might be otherwise. Parties in a contract can agree that Delaware law will apply when bringing their claims in Texarkana, if they have a connection to the jurisdiction.

The Fifth Circuit holds that if the Plaintiff does not do that, dismissal is appropriate.

Your Honor, nothing in the Plaintiffs' two complaints sets forth the facts that would permit the Court the determine the governing law. Now, Plaintiffs argue in their opposition brief that you can tell where -- which state's law will apply but they're all over the map, Your Honor, and they're not referring to the allegations in their complaints. They argued Texas and then they argued New York and then next, who knows what they will argue.

So we're confused as to what law they say should apply. We have told the Court that the only law that would

make sense would be Virginia, but we don't even need to get there because what is clear is that the Plaintiffs have failed to set forth in the complaint the facts that would permit Your Honor to determine which state's law applies to these new claims.

Your Honor, the fifth reason, independent reason the misrepresentation claims should be dismissed. The misrepresentation they allege are not actually in the IDSA Lyme disease guidelines, which is the only place they point to where alleged misrepresentations were made and we set forth this in detail in our filings. I'll give one example.

Your Honor, they allege that one of the misrepresentations is the following quote: Quote, all Lyme patients are cured by a short course, 14 to 28 days, of antibiotic treatment, end quote.

Your Honor, that statement is nowhere in the guidelines. They can't show it to you there and that's just one example that alleged misrepresentations are just their own characterizations of the guidelines. They never actually give you the alleged misrepresentation from the guidelines and when they try to, it's clear that it's not -- it's actually not false.

The sixth reason, Your Honor, independent reason, the misrepresentation claim should not go forward is that

the law says that for misrepresentation you have to allege facts that can be adjudged true or false. You can't allege to support a misrepresentation claim opinions. But in this case, the misrepresentation claims they allege are merely opinions.

On the key point, which is their assertion that the IDSA Lyme disease guidelines denied the existence of chronic Lyme disease, that is just the opinion of these doctors and scientists who looked at in 2006 all the available studies and explained them and gave their opinion.

And here is how the complaint reads. The complaint says: That the 2006 guidelines specifically state there is absolutely no treatment failure for Lyme disease. And then their support is the following actual filing they quote from the guidelines. Here is their support from the guidelines: There is no convincing biologic evidence for the existence of essentially chronic Lyme disease.

So the key is where it is and what it says. That statement comes after a long discussion of many studies regarding so-called chronic Lyme disease and the statement is there's no convincing biologic evidence for the existence of symptomatic Lyme disease among patients who received the recommended treatment course for Lyme disease.

Convincing biologic evidence, that's an opinion, Your Honor, that gives these doctor's opinions. They don't say there's absolutely nothing out there about it. They say there's no convincing biologic evidence and they are trying to build a misrepresentation claim on that statement. Not allowed under the law. The law says you need a statement that can be proven, as a matter of fact, true or false.

Your Honor, the last reason, the seventh reason these claims should not go forward is that judicial estoppel. Your Honor, you should apply judicial estoppel to block these brand-new personal injury claims. Your Honor, Plaintiffs agree that judicial estoppel applies, that the Court has the ability to do this, but they just agree that it doesn't apply here because they just made a mistake.

But, Your Honor, here is what they did. Throughout the case until we got to their Second Amended Complaint, they argued repeatedly that they're not seeking damages for personal injuries.

They argued it to keep their RICO and antitrust claims alive because it was argued at the beginning of the case that you can recover only for injuries to business or property. They argued it in response to the motion to impose independent medical exams on them and particularly

with respect to keeping the RICO and antitrust claims alive, they succeeded, Your Honor, held in part because they are alleging -- not seeking personal injury damages, they're seeking business or property damages and the RICO and antitrust claims will survive.

Your Honor, they then turn around and seek damages in these new claims for personal injuries that abuses their position, prior position taken before the Court and judicial estoppel is appropriate to block their new personal injury claims.

Your Honor, finally, allowing these new misrepresentation claims to go forward would damage the beneficial development of medical practice guidelines. Medical professional societies cannot be exposed to these misrepresentation claims brought by patients who do not and cannot assert that they relied on the guidelines.

The chilling effect would set back the development of these clinical practice guidelines at a time when we need them. We need professional societies to be studying diseases and recommending diagnostics and treatments and in this case, if these claims are allowed to go forward, it would expose them to all sorts of troubling liability claims.

And the practicality of this where the key people involved are the doctors who Plaintiffs alleged relied on

the guidelines and failed to treat each Plaintiff, many of these Plaintiffs allege they went to dozens of doctors who didn't diagnosis their Lyme disease. Each one of those doctors they could be alleging relied on the guidelines in doing so.

That's what they say. They don't identify them all but that would involve hundreds of these doctors who are alleged to have relied on the guidelines, failed to diagnosis Lyme disease and we would have to take discovery of them and understand is that why they missed the Lyme disease or was there some other reason. Would IDSA need to consider whether to join to the lawsuit because maybe it was something else that happened that caused the damage. It's impractical, it's terrible policy and it's not been adhered to by any court, state in this country and it should not go forward.

Your Honor, I reserve the rest of my time for rebuttal unless you have questions, of course.

THE COURT: Thank you, Mr. Dunn.

MR. DUTKO: May I proceed, Your Honor.

THE COURT: Yes, please.

MR. DUTKO: Your Honor, again, Daniel Dutko on behalf of the Plaintiffs. To start with, Your Honor, there is a scheduling order put in place signed by this Court, circulated by the Defendants that allows the pleadings

amendment deadline without leave of Court in April. Many months before that deadline we amended our pleadings.

Counsel for the IDSA claims that, well -- so counsel for the IDSA claims that they're somehow prejudiced by these new claims because they came out of nowhere, yet on the other hand they're claiming that they have known about the claims all along because they were in the original complaint. They can't have it both ways. It's either they're sandbagged and it came out of nowhere or we have known about them since the original complaint was filed.

The truth is, Your Honor, the Plaintiffs in this case -- as the Court will recall, the Plaintiffs in this case have spent a lot of time spending to 12(b)(6) motions. We have four separate 12(b)(6) motions, two filed by the insurance companies and two filed by IDSA and the doctors.

We had two very long hearings in which we went over and had to prove our case in-depth. In fact, we had to -- unusually, we had to present evidence with our complaints so that we could overcome the burden.

And so, while we had a general understanding that these misrepresentations were going on, it was not until the depositions that we were able to get evidence to establish that misrepresentation was clearly happening in this case.

And just so the Court knows, Mr. Buskey (phonetic), the corporate representative, was deposed on November 24, 2020. Dr. Shapiro was deposed on December 21, 2020. Dr. Wormser was deposed on January 7, 2020, and in January, after these depositions, is when we amended our complaint to add these causes of action well before the pleadings deadline.

So the issue before this Court is whether we met the pleadings requirement. There is no dispute and we have cited the case law that our negligent misrepresentation claims have opinion requirement of 8(a). We clearly meet that. That was just the notice pleadings. So the question is does our fraudulent misrepresentation claims, do they meet the Rule 9(b) pleading requirements.

Counsel for the IDSA continues to claim that we need to meet the RICO standard for pleading under negligent misrepresentation -- fraudulent misrepresentation and that is not correct. In fact, we cited two cases from the Fifth Circuit, Herman Holdings and Williams v. WMX Tex, and I will quote: A Plaintiff pleading fraud to specify the statements contended to be -- a Plaintiff pleading fraud to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made and explain why the statements were fraudulent.

Your Honor, our Third Amended Complaint, filed

well before the pleadings deadline, sets forth in great detail what the statements were, who made them, when they were made, and why the statements were fraudulent. Mr. Dunn seems to -- counsel for the IDSA seems to indicate or say that we never quoted to the guidelines. Well, I'll read the guidelines. They say: There is no convincing biologic evidence for the existence of symptomatic chronic B burgdorferi infection among patients after receipt of recommended treatment regimens for Lyme disease.

The IDSA takes a clear position in that statement and many more that chronic Lyme disease does not exist, that once you receive the recommended treatment of short-term antibiotic there is no active infection, you do not have Lyme disease. Well, when we took the depositions of Mr. Buskey, Dr. Wormser, Dr. Shapiro, at the end of 2020 and beginning of 2021 they clearly establish that treatment failure exists.

So we know, Your Honor, that there is treatment failure. We know, Your Honor, that the IDSA takes the position that treatment failure does not exist. This is a misrepresentation. We set forth in detail when those statements were made. We set forth how they were fraudulent. We set forth how they were false and set forth how they were relied on. So we know, Your Honor, that there's more than enough in the pleadings requirement of

Rule 9(b) for fraud to meet our requirements to establish fraudulent misrepresentation.

Your Honor, counsel for the IDSA goes into great detail to say we can't have a chilling effect on the IDSA. They're just simply creating guidelines. Your Honor, the IDSA is not just some sort of organization that puts its guidelines out and then sits around hoping people will rely on them.

As you saw from the letters to Congress, from the letters to state representatives, lobbying efforts to convince people that these are the only guidelines. You saw the Tick-Borne Working Group says the IDSA pushes these guidelines as the only guidelines. You saw the Tick-Borne Working Group say the IDSA won't even reference other ideas, other treatments.

Not only that, but how many treatment organizations have been investigated by the Attorney General's office for antitrust abuse. The IDSA lost their right a long time ago to say they're an independent group and they have no culpability in this. They put out false guidelines that they know are false. They put out false guidelines that say for example -- and this is detailed in the complaint -- that say the way that you test for Lyme disease is the two-tier test and that's how you determine whether someone has Lyme disease.

The doctors deposed at the end of 2020 and beginning of 2021 testified, Your Honor, those tests are not only inaccurate, but they do not show an active infection. So the representation that the IDSA makes to doctors around the country is if you want to determine whether your patient has Lyme disease use a test that they say that IDSA doctors admit is inaccurate and doesn't show infection.

Your Honor, as to judicial estoppel, we claimed that we couldn't seek personal injury damages in a RICO case. We never claimed that we couldn't seek personal injury damages in a misrepresentation case. There is no -- I'm not sure how judicial estoppel stops us from making these new claims.

And -- give me one second, Your Honor.

And on the issue of choice of law, Your Honor, finally, we did answer the question what law -- what law applies. In fact, we cited numerous cases out of the Fifth Circuit and they all say that when a Court is resting in federal question jurisdiction and not diversity jurisdiction, the choice of law does not apply and the Court applies the choice of law rules of the forum state.

Your Honor, this case was filed under federal question jurisdiction. We have been sitting under federal question jurisdiction. The only law that applies is the

law of the forum state Texas. We have cited numerous cases to that effect.

Counsel, very early on, the IDSA very early on tried to get this Court to dismiss this case by claiming all the doctors were in New York, all the people in New York, everyone worked in New York, it should be in New York. When we pointed out that we will apply New York law based on their representations, they ran away from that and now are claiming that New York law should not apply.

So if Texas law doesn't apply and New York law applies, both states recognize all these causes of action that we have asserted and, Your Honor, based on that we ask the Court to deny their motion to dismiss because we have clearly admit the pleading requirements and we met the Court's deadlines.

THE COURT: Thank you Mr. Dutko.

Mr. Dunn, brief response.

MR. DUNN: Sure. So look, Your Honor -- (audio disruption) -- argue that the claims in the original complaint, then we would have known about them, not true. The facts were all there but the claims never were there and to defend ourselves, we needed to know about the claims at the beginning of the case. It's absolutely prejudicial to bring these brand-new -- they're completely new. It's a complete new case.

Case 1 concerned all the actions of the doctors working with the Insurance Defendants to get payments and write false guidelines.

Case 2 now concerns all the reliance of these unrelated third-party doctors they allege relied on the allegedly false guidelines.

Your Honor, we have shown this in our response briefs but there's nothing new from the depositions which did occur in the fall, and the last one in January, more recently. No testimony was new. There's nothing in there. We have demonstrated that in our responsive papers.

Your Honor, the pleading requirements. First of all, the law is clear that the negligent misrepresentation claims do have to meet the Rule 9(b) requirement and even if not, even if only the 8(a) requirements, they still don't meet that. They never tell us which doctors relied on the alleged false statements. That is the core of any misrepresentation claim, Your Honor. It starts with reasonable reliance, whether its fraud or negligent misrepresentation and that is what you have to plead.

Your Honor, he cites a case that says you have to plead and identify the speaker and identify the statements. In that case the Plaintiff alleged that he or she relied on the statements. In those cases, it's very clear who is relying on the statements and when they heard them.

That's not the case that they want to bring here. They want to bring a case in which for each Plaintiff there's potentially dozens of doctors who relied on the allegedly false statement. They don't plead it. They have to plead it and now they're not even asking for the chance to do it again. They're standing on their pleading. It's not there. It's nowhere there.

Your Honor, they say that IDSA takes the position that treatment failure does not exist. That's what Mr. Dutko said. The guidelines don't say that. The guidelines speak of retreatment when it's necessary. The guidelines speak of Lyme arthritis that can go on for months and require new treatment and need treatment. There's no statement in the guidelines that treatment failure does not exist and it's not there.

Your Honor, they referenced the Connecticut Attorney General investigation for antitrust. The Connecticut Attorney General never found an antitrust violation, nothing close, there's nothing like that in the one document they have, which is a press release. They just settled and had a do-over, a new look at the guidelines, they had a new panel that was cleared for conflicts and what did that panel do? That panel looked at all the science and said everything is valid. We recommend no changes to these guidelines. We looked at the same

studies they looked at, they're valid.

Your Honor, Mr. Dutko argues that the two-tier test is the only way you can test for Lyme disease and that's false. The guidelines don't say that. They make clear that the test was an antibody test that, number one, should be given at the beginning of the belief that you might have Lyme disease because it's not effective, and number two, it could -- it doesn't show active infection. It's clear that it's an antibody test that shows antibodies.

That's the best test that is available now and that is -- it's a test that has its uses and the guidelines don't say it and they can't point to a place where the guidelines say it, that that's the only way you can show Lyme disease. They make clear in the early stages, don't test, look for a rash and then you can find Lyme disease. That's not what the guidelines say. You have to test.

Your Honor, judicial estoppel we have gone over. I don't think we need to discuss it again.

Choice of law. Your Honor, common law claims are not federal question jurisdiction claims. And so when you bring a RICO and antitrust claim, the substantive law that applies is federal law. When you bring a common law claim, you have to find a state law and here they haven't pled in their new amended complaint which law should apply. Like

Mr. Dutko says, New York law now should apply. There's no fact in the complaint that you could find that will take you to New York law. It's not there. It's just not there. So, Your Honor, the new misrepresentation claim should not go forward.

THE COURT: Thank you, Mr. Dunn.

MR. DUNN: Thank you, Your Honor.

THE COURT: Okay. I think that leaves us with the motion to stay and the motion for sanctions. I don't know if the parties are actually going to need the amount of time we have set aside for those motions. And I guess I have a question about the motion to stay, honestly, whether that is in light of where we are, whether the parties even need to present argument on that, but I'm happy to break now and we can come back if we think it'll truly take an hour to argue these motions but if they can be handled relatively quickly, we can go forward and hear them now. I think we've heard arguments related to both of these motions spread throughout the morning's arguments already.

MR. DUTKO: Your Honor, in light of the recent -- may I speak?

THE COURT: Yes, Mr. Dutko.

MR. DUTKO: In light of -- in light of the recent -- we have in essence stated everything. So, you know, we entered a joint order kind of staying all the deadlines

anyway, so as reluctant as we were to stay the case, we basically agreed to stay, so I don't know if we need to address it.

MR. DUNN: Your Honor, Alvin Dunn. I agree. I just think that -- and I hope the Court agrees, that additional pretrial activity should not resume until the Court determines whether any of Plaintiffs' claims have survived Defendant's motions.

THE COURT: Well, you know, maybe we do need to hear argument on it because I think potentially what the -- what you're asking for, Mr. Dunn, is really, you know, in conflict with our Local Rules and the Court's practice. I think what Mr. Dutko has said is that the parties have effectively stayed the case by agreeing to get these motions briefed up and argued and presented. I guess it's just a question about whether either side at this point thinks a new DCO is necessary.

But, you know, Mr. Dunn, you're, I'm sure, well familiar that our Local Rules do say that we expect parties to continue with their case even when dispositive motions pending.

MR. DUNN: I appreciate that, Your Honor. I guess we don't think that we should proceed to expert discovery on the antitrust claims or to full discovery on the misrepresentation claims unless we have additional guidance

from the Court. I think Plaintiffs have effectively agreed by submitting and agreeing to stay the prior deadlines. That's our position and we'll of course abide by the Court's rules.

THE COURT: Let me hear from Mr. Dutko about it. I'm inclined to completely agree with you, Mr. Dunn. It seems to me, given the parties's agreement, I think this motion is moot, but if we need to hear argument on it, I'm glad to hear it.

MR. DUTKO: Your Honor, I think we're kind of saying the same thing, but I don't want the Court to believe that we kind of want to stop the whole case. We still need to get ready for trial and we still need -- I'm happy to put off expert deadlines with Mr. Dunn if that is the primary concern for an extended period of time until the Court can rule on the motions but we have -- we have made representations, Your Honor, to Mr. Dunn that in light of the new claims, he wants to take brief depositions of the Plaintiffs. Those things should move forward so that we can prepare for trial.

I mean, what I don't want to do, Your Honor, is I don't want the get to the eve of trial and then Mr. Dunn say well, I wasn't able to take all these depositions because we basically stayed the case.

So I do agree that we can put off some deadlines

to appease Mr. Dunn, but I agree with the Court that we I don't want to stop the case cold.

THE COURT: Let me say if this if it's helpful and I agree with you, Mr. Dutko. We're all sort of saying the same thing.

I'll tell you our trial schedule over the next several months. Regardless of what I end up doing on these dispositive motions, we are backed up with trials from now over the next several months. So I tried a case last week. I am trying a case next week, I'm trying a case the week after that, we have three cases to try in May. Given the world we have lived in over the past year, we're just now, I guess, realizing the effect it's going to have on our trial schedule over the next year.

So, you know, I can assure you the odds are, you know, relatively good that we could not get this case scheduled -- I think we do have a setting in September, but I don't know candidly whether that's realistic at this point, given our calendar and the backlog we've got and where the parties are in terms of discovery.

So to the extent that helps in any way, I would suggest the parties visit about this some more. But again, Mr. Dunn, you did file a motion to stay, it's been fully briefed and it's set for argument, so if you want to go forward today presenting that motion, I'll be glad to hear

it.

MR. DUNN: Your Honor, I'm happy to try -- take your guidance that we should discuss with Plaintiffs what additional activities should take place and when.

THE COURT: Is that fair enough?

MR. LEE: I'm sorry. I didn't mean to interrupt, Your Honor, I was going to add a comment if I may. If not --

THE COURT: Yeah, that's fine. I was going to ask Mr. Dutko his thoughts but I would like the hear from you as well.

MR. LEE: Sure. And Mr. Dutko has been more in the line of fire, if you will, on these things, but with my name on there I figure I should make a comment.

In all my experience over these many years in court, I do think for what it's worth and I think this is what I'm hearing from Your Honor, we need to figure out what we can do without issues because whether we go the trial in September or you tell us we have to go next year assuming we prevail these motions today, your first inquiry is going to be where are we and what do we have left to do.

And it makes no sense to me to not try to do everything we can to move forward so when Your Honor says we're ready for you, Mr. Egdorf and Mr. Dunn, that we are ready to jump, rather than us saying we have a lot of stuff

we have to get done.

My suspicion from what I thought I was gathering from Your Honor is that you see it the same way, but I didn't want to put words in your mouth. But assuming that is somewhat correct, that might be helpful in guiding our discussions with Mr. Dunn.

THE COURT: Let me say this. I'll endeavor to have an order out on these motions as quickly as possible, but I am not going to promise you to have them out by a certain date. I have learned my lesson the hard way about that. This is -- this is a hard-fought case, and you know, the -- the motions have been well briefed and presented here today, and I -- I will look forward to getting an order out as quickly as possible. I don't know whether that's two or three weeks or maybe a little bit longer.

Here is what I would suggest you all do. You all meet and confer about what remains to be done in the case and discuss whether, given the status of the case currently, recognizing that motions to dismiss have been filed, the case could be gotten ready by September or whether more time is going to be necessary.

Let me ask you all to do that within say 14 days and provide us with a status update about that. My sense is, as the case stands right now, you-all would not be prepared to go forward on September, but I could be wrong

about that and I -- just like I'm not -- Mr. Egdorf doesn't want to put words in my mouth, I don't want to put words in your mouth. So I don't know whether you could or you couldn't.

You-all visit about it and see if you can reach some sort of an agreement and if you can, let us know that and if you can't, let us know that. How does that sound?

MR. LEE: Yes, Your Honor, and if I may add a thought. If by chance and I don't know the answer, I'll have to confer with my colleagues, but if the answer is no we don't think we'll be ready by September, I would suspect you would like us in this report to tell you when that date would be.

THE COURT: Yes, I would.

MR. LEE: Thank you, Your Honor.

THE COURT: Okay.

Is that okay with you, Mr. Dunn?

MR. DUNN: Yes, Your Honor. I'll be candid. I think our position is going to be that we absolutely could not be ready to have this case ready to try in September, even if the only claims that remain are antitrust claims against IDSA and the brand-new case that will go good forward because as we have briefed and argued, even antitrust claims, the expert deadlines were long ago and we need additional discovery there and also as we briefed and

argued if the misrepresentation claims survive, there's so much that would need to be done.

So you have our position in the motion to stay and I'm happy to take two weeks and discuss with Plaintiffs what should happen while we wait for the Court's rulings but I wanted to respond honestly to the arguments I'm hearing.

THE COURT: That's fine. I understand that. Let me suggest this, Mr. Dunn, you all have the meet and confer within two weeks, and then immediately thereafter, file a status update and let me know what you-all have discussed and the resolution of it and we'll at least know a little bit more once that's occurred.

MR. EGDORF: Absolutely. Thank you, Your Honor, we'll do that.

THE COURT: Okay. And then the final motion for argument is the motion for sanctions, Mr. Dunn. You may proceed.

MR. DUNN: Yes, Your Honor. Thank you very much. This is the final motion.

Your Honor, we -- (audio disruption) -- stipulation -- I don't know if anybody has a mic on that could be muted because I'm getting feedback.

THE COURT: Yeah, anyone not speaking, which means everybody except Mr. Dunn, if you would mute your

microphones, please. All right.

MR. DUNN: Thank you, Your Honor.

THE COURT: That's better.

MR. DUNN: I think so, yes. I'm not hearing the feedback any longer.

Your Honor, we're now facing a situation that is precisely covered by Rule 11 itself and the notes to Rule 11. As the Court knows, Rule 11 provides that when an attorney or a party provides a pleading to the Court, the attorneys who sign the pleading -- and that's the case here, it's the attorneys -- certify to the best of their knowledge the factual contentions of evidentiary support or if specifically so identified will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Your Honor, I'm not seeking sanctions against Plaintiffs for filing their original complaint, which alleged large consulting payments from the Insurance Defendants to the doctors based on information and belief. This Court ruled that Plaintiffs were entitled to full discovery, which under Rule 11 is the reasonable opportunity to develop evidentiary support.

Your Honor, it's just common sense that Plaintiffs after completing discovery and finding no evidence to support their claims, should not be permitted to continue

to press those claims. It's common sense. Not only is it common sense, it's also addressed specifically in the notes to Rule 11.

Your Honor, those notes say that tolerance of factual contentions in initial pleadings by Plaintiffs where those contentions are specifically identified as made on information and belief. That's what the rules allow, what the notes say that tolerance does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that's reasonable under the circumstances. They go on.

The tolerance of the ability to file original claims on information and belief is not a license to make claims out any factual basis or justification and here is the key part, Your Honor. The notes to Rule 11 say if -- moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the Plaintiffs have a duty under Rule 11 not to persist with those factual contentions. The notes say the rule doesn't require a formal amendment to the pleadings for which evidentiary support is not found but rather calls upon the Plaintiffs not thereafter to advocate such claims or defenses. Those are the notes to Rule 11, Your Honor. Common sense.

Your Honor, Plaintiffs here have done precisely

what these notes to Rule 11 prohibit. They had a reasonable opportunity for further investigation or discovery. They persisted with their factual allegations they yet again made without evidentiary support. After full discovery they refiled their RICO and antitrust claims in their Second Amended Complaint. They again alleged large consulting payments from the Insurance Defendants to the doctors, but in that same pleading they said we still need meaningful discovery to find the evidence to support these claims.

But this was January 7, 2021, Your Honor. Discovery was over. So they filed their Second Amended Complaint in violation of Rule 11, claims refiled without evidentiary support but they didn't stop there, Your Honor.

They filed a Third Amended Complaint. The same allegations that lacked evidentiary support. They doubled down on their Rule 11 violation. And they kept going, Your Honor. They filed motions to dismiss the Second Amended Complaint and the Third Amended Complaint.

And then they alleged in response to those motions that they learned for the first time that the guidelines provide false information about treatment failure. False as we showed in our pleadings. They made those allegations in their original complaint.

They claimed they learned for the first in the

recent depositions that IDSA provides false information regarding testing. False, they put that in their original complaint.

They allege they learned that the IDSA 30(b)(6) deposition that IDSA takes the position it's the leading authority on the diagnosis and treatment of Lyme disease. Again, Your Honor, false. That very statement was in a letter from 2015 that the Plaintiffs themselves brought to the deposition. They didn't learn it at the deposition. They learned it from the letter, six years old.

And, Your Honor, they opposed our summary judgment motion and acknowledged that finally when they are obligated to come forward with the facts that they don't have the facts and they said they will dismiss their RICO claims. But then they said as an excuse, the reason they have to do this is because IDSA and the doctors destroyed or failed to produce relevant documents.

Again, false, Your Honor. IDSA and the doctors produced everything they were obligated to produce, nothing was destroyed and the Plaintiffs never moved to compel production.

And then, Your Honor, their most egregious was their actual response to our Rule 11 motion and they specifically claim that IDSA destroyed specifically the evidence that it submitted to the Connecticut Attorney

General and we have been over this, Your Honor. That's the most egregious lie. IDSA preserved the evidence, it told the Plaintiffs that it preserved the evidence, it searched the evidence and found nothing responsive according to the scope of discovery this Court entered.

Your Honor, it's a very clear Rule 11 violation. Its a violation of the Rule 11 text itself and in this exact situation is specifically addressed in the notes to Rule 11. Your Honor, it's an abuse of the Court, what the Plaintiffs did. Rule 11 sanctions, if they're ever appropriate, they're appropriate here.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Dunn.

Mr. Lee.

MR. LEE: Yes, Your Honor. May it please the Court, Lance Lee on behalf of the Plaintiffs.

Let me start by saying, Your Honor, that we take this motion very seriously. Suffice it to say that we're more than disappointed that we're having to defend ourselves against this motion and these accusations, but with all due respect to counsel, I don't believe that this motion should have ever been filed. And there are basically three reasons why.

First of all, and I think the easiest for the Court to decide, but what apparently Mr. Dunn is not

recognizing is with respect to the RICO allegations, we made the decision to withdraw those allegations, dismiss those allegations, if you will, during the "safe harbor" period related to Rule 11. We did it before that time expired. Therefore, Your Honor, we should not be -- we shouldn't even be discussing this as far as the RICO allegations are concerned.

Second, Your Honor, with respect to the new allegations or the allegation regarding our misrepresentation claims, counsel includes four sentences in their motion for sanctions about these misrepresentation claims.

As Mr. Dutko stated during his presentation on the motions to dismiss and I won't reiterate all of those things, we did receive new evidence and we did follow the Court's instructions as outlined in the docket control order. We did properly amend, and there was nothing nefarious or inappropriate about the addition of those misrepresentation claims. So I think that that's a fairly easy decision for the Court to make as well in the context of Rule 11.

Now, the antitrust issue is -- is troubling to me on a number of levels. First of all, this Court told us not once, but twice that our pleadings with respect to antitrust were appropriate. There was no heightened

pleading standard. We all understand that the law indicates that there's no heightened pleading standard, and we have met that standard. We're now at the summary judgment phase. We have obviously significant disputes as to whether summary judgment is appropriate.

So I don't understand how Mr. Dunn can look at what we have done and that the Court has previously blessed in our pleadings and tell us that we have now violated Rule 11. And in his cover note of February 4, 2021, the Defendants states that we filed our Third Amended Complaint, which did not amend Plaintiffs' RICO or antitrust claims.

The question I have, Your Honor, is why would we amend our antitrust claims? We didn't have to amend our antitrust claims. You have already told all the parties twice that those claims are sufficiently pled. We have already satisfied that standard.

And now we can't be subject to this type of motion, much less even violating this motion, given that -- that we weren't even required to say another thing at the pleading stage with an amended complaint relating to antitrust claims.

Our complaint doesn't have to be a trial brief that outlines every factual issue, our final complaint in the case. It doesn't have to be like that. So this aspect

of the motion, in my opinion, respectfully, is clearly inappropriate.

Now, what I suggest is even more inappropriate and disturbing to us is what we have now definitely found out from the IDSA and Mr. Dunn through this briefing process and we have talked about it already, but I think we have to talk about it some more.

If they withheld relevant discoverable information that goes to the very heart of our antitrust claims, then we need to see that and we need to see that now. And the discovery obligations, the Court knows better than I in the Eastern District, require that documents be produced through additional disclosures, that parties do not have to go through the request for production process like we have to in so many other jurisdictions.

On July 13, 2018, the IDSA certified to the Court that they had provided those initial disclosures. Now, I understand that the first motion to dismiss was pending. And that we had basically agreed to a standstill or at least very limited discovery during that standstill period. There's been a lot of water under the bridge.

But, Your Honor, once you denied those motions, once you allowed our antitrust claims to proceed, there should have been an immediate or at least soon thereafter supplementation of those disclosures to include the CID

responses that were provided to the Connecticut AG. We didn't get anything. This idea, Your Honor, that we would have somehow agreed to one narrow category of documents to support our claims against the IDSA, it -- to me is ludicrous. And I didn't understand any agreement in that regard.

When we came before the Court in the winter of 2019, we were discussing time frames. We were discussing issues related to time and then ancillary to that, what the parties would have to look for in relation to those time frames. That was our discussion.

This complaint and these antitrust claims have never, ever been just about payments. We can look at our Third Amended Complaint and go back. If you look at -- I'm just looking at, for example, paragraph 117 and I believe this is a similar paragraph that was in our previous complaints.

We talk about things like refusing to meaningfully consider information regarding the existence of Lyme disease, excluding scientists and physicians with divergent opinions, failing to conduct conflicts of interest reviews with the panelists. All of those things, Your Honor, constitute the basis for our antitrust allegations. Those and much more. It's not just about payments. So it defies logic that Plaintiffs would have ever agreed to forgo any

discovery on anything other than payments.

Now, Your Honor, Mr. Dunn talks about then AG Blumenthal not issuing any type of finding of antitrust violation. He found something and that something had to be in those responses that we have yet to see. We have never soon. So we asked the Connecticut AG office for those documents. We subpoenaed the Connecticut AG. We provided Mr. Dunn with notice of that subpoena.

Did he file any objections as to the scope of that subpoena, which he should have done? No, he didn't. So it belies -- that belies the fact that this is all just about a narrow provision in that joint report.

And, Your Honor, I think that we're now in the position, given the timing and I do need to address this. Mr. Dunn accuses us of saying that the IDSA destroyed documents. I think that Mr. Dutko adequately addressed that, but I would like to make one more point about it.

Either the documents were there at some point in time or they're not now or they're being withheld and it's clear from the reply briefs filed by Mr. Dunn on behalf of IDSA that they're still there. So, Your Honor, I -- believe now we're in the position of having to ask this Court for leave to file a motion to compel these documents. I don't believe that we can proceed without doing so, but that is an issue for -- for another day and hopefully a

quick day.

But circling back to the actual motion for Rule 11 sanctions, I don't believe there is anything with relation to any of these three areas that would allow this Court to impose sanctions on Plaintiffs in this case and I would respectfully request that the motion be denied.

THE COURT: Thank you, Mr. Lee.

Mr. Dunn, a short response?

MR. DUNN: Thank you, Your Honor.

His first point was that the Plaintiffs agreed to withdraw their RICO claims. They did say they would dismiss them. Number one, they did not dismiss them unless seven weeks later. They promised to and it took me multiple emails to get them to do that. That's one.

Two is the antitrust claims are based on the same allegations. They haven't dismissed those and its the same allegations without any evidentiary support that they replead in their Second Amended Complaint.

Your Honor, the misrepresentation claims. Plaintiffs claim they have new evidence that they properly amended. No, there was no evidence. We have set that forth. There is nothing new in the depositions.

Your Honor, the allegations of payments are the same allegations supporting the RICO claims that support the antitrust claims, that's what it's all about.

Your Honor, they say why would we amend our antitrust claims. The notes to Rule 11 say Plaintiffs, you don't have to amend your antitrust claims, but you cannot continue to press them. When you have no evidence, when discovery is over, the notes say you can't press them any longer and what they did, though, was they filed a new pleading in which they continued to press them and that violates Rule 11. It's right there in the notes.

Your Honor, they say that we should have turned over these Connecticut AG materials in our initial disclosures. No. At that point, discovery by agreement with Plaintiffs was limited to the prior four years. We then later had a the dispute as to how far back discovery should go and that dispute was resolved and it's very clear, Your Honor. It's in the filed Docket 181.

We agreed, Plaintiffs agreed, that we would go back prior to 2010 in very limited ways and we promised and we did review everything including the Connecticut Attorney General materials for what was really important to them and this is what the agreement says: Communications with the Insurance Defendants regarding the Lyme disease guidelines, payments from the Insurance Defendants related to Lyme disease consulting arrangements.

That's what we scoured those materials for. That's what we promised to do. That's what they agreed we

would do. If they wanted and thought they were entitled to 100 percent of everything prior to 2010, we would have had a different discussion, put a dispute before the Court, the Court would have decided what to do.

THE COURT: My recollection, Mr. Dunn, is that we had a hearing and I asked the parties to engage in some further meet and confer and that was the resolution, but I could be misremembering all that.

MR. DUNN: You're exactly right and we resolved it and actually, we, IDSA and the doctors agreed with the Plaintiffs on the exact scope because we were willing to go back to 1995 for the limited areas they wanted us to look for prior to 2010. It's very detailed, when will we search emails, when will we search non-email documents, et cetera and then the Insurance Defendants and the Plaintiffs were not able to agree. They put that dispute to Your Honor and Your Honor ruled on that dispute and Your Honor needed to actually determine the scope of the discovery that applied to the Insurance Defendants.

Your Honor, just of course, entered the agreement of the parties with respect to the scope of discovery before 2010 related to IDSA's and the doctor's obligations. That's what happened, Your Honor. You remember that absolutely correctly.

Your Honor, the AG must have found something, it

has to be in the response that Plaintiffs have never seen. Your Honor, still, we searched everything as the Court ordered and to say that they need to move to compel now for production of documents with respect to an effort to save their antitrust claims after discovery has closed is highly prejudicial, improper and they're a only saying this in response to the Rule 11 motion where they say, no, you must have destroyed documents. You destroyed documents and we have to come back to them and prove a negative.

We didn't destroy documents, Your Honor. I cited it at the beginning of the second session. The IDSA corporate deposition is very clear. It says that they preserved the Connecticut AG materials and searched them according to the Court's order. This is November of 2020. There's no confusion. There's no effort to hide anything. I don't know why Plaintiffs' attorneys might be somehow surprised at this point.

Again, full document discovery was completed as of June 1, 2020. If they thought they were missing something then, they would have asked. This is way too late and it's in response to a very valid and compelling Rule 11 motion, Your Honor, Rule 11 sanctions are appropriate and we appreciate the Court's consideration of our Rule 11 motion.

THE COURT: Thank you, Mr. Dunn.

I think that completes argument on the motions

that we believe need argument on. As I said, I can't make you promises on when the summary judgment order and order on the motions to dismiss will be out, but hopefully it'll be relatively soon given what our trial schedule is over the next several weeks but we'll do our best. Other comments or concerns, questions by anyone?

MR. LEE: If I may, Your Honor, can I do a little housekeeping with you or at least a little update for you?

THE COURT: Yes.

MR. EGDORF: As the Court I'm sure has seen repeatedly and that might be why some of the insurance folks were on the call. As Your Honor knows, we have settled the case with everyone except for Mr. Dunn's clients. We have been, you know -- I think I see Mr. Holt and he and I have talked too many times trying to round up all of the Defendants on seeing if we can get some sort of agreement on release documents and things like that and that has taken a significant amount of time, as you might suspect with this many lawyers who all think their wordsmithing is the best way to do it.

So that is why, Your Honor, you have seen so many "can we have 30 more days," those kinds of things because we're trying to get all that paperwork done and why it then becomes significant, and Mr. Dutko can correct me if I'm wrong, I think we have four minor Plaintiffs that are still

in the case that we're going to have to do ad litem approval hearings.

We do have an ad litem. Your Honor has signed an order for an ad litem. That ad litem we have talked to at length. He has been given significant materials and done a great deal of work, but as I understand it, he is just waiting for us to finally get all the documents, so all the clients can sign them.

So, you know, we're all kind of, I think, disagreeing a little bit about the documents but I don't want the Court to think we're all doing the mess around. Our clients want to get paid and I'm sure Mr. Holt and the other Defendants -- maybe not in a hurry to pay us, but probably tired of attending court hearings or reading paperwork.

Anyway, I'm sure Your Honor wants to get to lunch, I didn't want to belabor it but I wanted to make sure since we had an opportunity to visit with each other that was 100 percent clear that you understood the status of this. It's my hope we clear up this paperwork situation soon. Obviously with this many clients and their health situations, getting them to sign all the documents, may take a little bit of work but that's where we are and I hope we can get this settlement hearing before you sooner rather than later.

THE COURT: That's fine, Mr. Egdorf. Appreciate those comments. Very helpful.

MR. EGDORF: That's all I had, Your Honor, and Mr. Holt or someone might want to say something different about that, but I think from the rest of us on our side, we are done for today and we appreciate all this time you gave for today. We're glad to be back with you and we'll await your rulings.

THE COURT: Thank you, Mr. Egdorf. Any other comments by anyone?

Mr. Holt, do you have anything you wish to say?

MR. HOLT: Nothing to add, Your Honor. I appreciate the update from Mr. Egdorf. I think I can speak for the other the Defendants, although they're not all here, but we have had the greatest conversations -- (audio disruption).

THE COURT: Okay. Good.

MR. ROESER: Same for Aetna.

THE COURT: Thank you, Mr. Roeser. Anything else?

All right. The parties's presentations were very helpful today. I appreciate those. Thanks for everyone's participation and we'll be in recess. Thanks to all of you.

(Time noted 12:47 p.m.)

COURT REPORTER'S CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s KATHRYN McALPINE/
KATHRYN McALPINE, RPR, CSR, CCR